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CURRENT TOPICS.

Tomson v. Dashwood is an interesting libel suit recently decided by the Queen's Bench Division, in which the state of facts is quite unique. The plaintiff was the managing director of a corporation, and a part of his duty was to make journeys to various places on the Continent on business connected with the company. The defendant was a director, and Col. Wood (to whom the alleged libelous letter was addressed) was the chairman of the company. On the 29th of November, 1882, the plaintiff and the defendant were about to go together on business connected with the company, and at the expense of the company. On the same day and before leaving, the defendant wrote a letter (which was the alleged libel), as follows:

DEAR COL. WOOD:—Should you come to Birmingham, take a look over the secretary's cash book and see the amounts paid to J. L. T. (the plaintiff), from petty cash right-hand column, for expenses, etc., in the months of October and November. To my mind they are enormous, but do not mention me in the matter. Of course, they may be all right and genuine, traveling and other expenses. I am going to pay my own this journey to keep them separate, and have drawn 10*l.* for that purpose.

This letter was addressed to Col. Wood, the chairman, and was intended to be sent to him, but at the same time the defendant had written another letter to the secretary of the company, and by mistake he inclosed the letter intended for the secretary in the envelope addressed to Col. Wood, and the letter intended for Col. Wood in the envelope addressed to the secretary. The secretary thus by accident got the letter, which he gave to Col. Wood, after having taken a copy of it, which he showed to the plaintiff, who was his brother. At the trial, the learned judge, after directing the jury that the occasion was privileged, left to them two questions, viz., first, whether the statements contained in the letter were a libel or not; and secondly, if they were, whether the publication of them was malicious. The jury found a general verdict for the defendant. A rule *nisi* for a new trial was obtained by the plaintiff, on the ground of the misdirection of the learned judge in telling them that the letter was privileged.

Said MATHEW, J.: "There is no evidence here of a malicious publication, but only of an accidental and negligent publication. The writing of the letter was honest, the preparation of it for the post was honest, and the sending it to the wrong person was due only to negligence. This act of negligence is not sufficient to deprive the defendant of the privilege, which, it is admitted, he otherwise would have had. It has been argued that the defendant ought to be held responsible for this negligence; but if this were so, and if an action would lie in this case, it would enable a plaintiff to bring an action in a case where it might be that all the defendant had done was to leave a letter carelessly about his room, so that another person could read it. I think the evidence of negligence here is extremely slight, as the person to whom the letter was sent had only to look at the first line of it, to see that it was not intended for him, and that it had been put into the wrong envelope by mistake. I am of opinion that the rule should be discharged."

USER OF DANGEROUS INSTRUMENTALITIES FOR THE PROTECTION OF PROPERTY.

It is told that an ingenius country parson once succeeded in scaring trespassers by putting up a notice on the wall of his garden, that a *polyphloisboio* was set there.[1] The Rev. Sydney Smith himself, trenchantly as he inveighed in the *Edinburgh Review* (1821) against man-traps and spring-guns, and vigorously as he impugned the opinions of Best, J., in Ilott v. Wilkes,[2] would have failed to find fault with that mode of protecting property from intrusion. Not, indeed, that he would have admitted, had the mysterious engine of destruction been really as formidable in force as alarming in name, that the notice would have rendered the use of it morally or legally justifiable. For the fifth imaginary judge, whose *pseudo* opinion on the law as it then stood with reference to this use of dan-

1 13 Parl. Deb. (2d) 1858.
2 3 B. & A. 304.

gerous instrumentalities has been forcibly enunciated by the wise and witty divine, clearly declares that "he who suffers from such machines has a fair ground of action, in spite of any notice, for it is not in the power of notice to make them lawful." So that even the Burgundian law, compelling a man who set spring-bows for wild beasts, not merely to give public notice that they were set, but to designate the very place by certain marks,[3] would scarcely have commanded his approval. The English Legislature, also, grew conscious at last that it was not exactly right to permit every lord of a manor to be his own Lycurgus, or rather his own Draco, and we have now express enactments on the subject of setting spring-guns and man-traps,[4] as well as on that of setting poisoned grain or flesh.[5] But, openings are still left in which the cases decided under the common law come into application; and circumstances, though happily not as cruel as the dog-poisoning described by *Ouida* in her "Village Commune," still occur in which it becomes necessary to consider this subject. At the present Queen's County assizes, indeed, this was the subject-matter of the ground of action in Sawyer v. Neale; and we find the authority of Ilott v. Wilkes, and Bird v. Holbrook,[6] invoked in the Scottish case of M'Gregor v. Ross,[7] decided in March last; while the *Washington Law Reporter*, of the same month, publishes another accession to our knowledge of the law in question, in the shape of a decision made so far back as the year 1842.

In United States v. Gilliam,[8] lastly adverted to, Gilliam was indicted for murder, one count charging it to have been committed by means of a spring-gun set by him for that purpose in a goose-house, and another count charging that the murder was committed by shooting. Said Dunlop, J.: "The setting of a spring-gun as a protection for property, though not in itself unlawful and indictable, is certainly undeserving of encouragement, and where no notice is given and injury or loss of life ensues, the party setting it is responsible as if he were present himself and fired the weapon. No man can do indirectly what he can not do directly. He must also so use his right as not to injure another. Where notice is given, the sufferer is held to have brought the calamity on himself—to be his own executioner if life is lost, and to have himself pulled the trigger. Such was the reasoning of the Court of King's Bench in the case of Ilott v. Wilkes.[9] All the judges in that case rest their judgment on the ground of notice. It has been contended by the prisoner's counsel in this case, that if Payne, the deceased, entered upon the premises of Gilliam on the night he came by his death, with the felonious intent to steal Gilliam's property, the prisoner is entitled to acquittal in the absence of notice that the gun was set, and though the felony was unaccompanied by force and did not amount to burglary. The broad ground is assumed that in all cases of felony, the felon may be lawfully put to death in the execution of his meditated crime, and that this position is maintained by the reasoning of one of the judges in the case of Ilott v. Wilkes; I can not sanction the doctrine thus asserted in the prisoner's defense. It arrogates for property higher immunities and privileges than are conceded to our dearest personal rights. The humane principles of the law do not thus lightly estimate human life. No language or manner, however reproachful or insulting, not even violence to the person of the most ignominous character, will justify the aggrieved in slaying the aggressor; he can only be justified or excused by showing his own life to have been in jeopardy. The law is that a man may oppose force with force in the defense of his person, his family or property against one who manifestly endeavors by violence to commit a felony, as murder, robbery, rape, arson, burglary. In all these felonies, from their atrocity and violence, human life either is, or is presumed to be, in peril. The principle does not apply to the thief who secretly steals your purse or other personal property in your fields or in buildings not within the privilege of the domicil. It does not apply to the felon who, by forgery, defrauds you of your money or goods. This distinction commends itself to your reason and common sense, and is sustained by numerous authorities which have been cited in the argument by the counsel for the United

[3] Leg. Burg. tit. 46.
[4] 24 & 25 Vic., c. 100, s. 31; 27 & 28 Vic., c. 47.
[5] 26 & 27 Vic., c. 113, s. 3; 27 & 28 Vic., c. 115, ss. 2, 3.
[6] 4 Bing. 628.
[7] 20 Scot. Law Rep. 462.
[8] 11 W. L. R. 129.
[9] 3 B. & Ald. 304.

States. When we find the books and the judges in some places in general terms speaking of the right to take the life of the felon in the execution of his meditated felony, we are to understand them as referring to felonies with force, of the character described. In no other way can we reconcile what would otherwise appear conflicting authorities and decisions. The setting of spring-guns, therefore, in open fields or out houses, not within the privilege of the domicil, without notice, would not justify or excuse the homicide which might ensue, but the party setting them would be criminally responsible for the consequences of his act." [It was, however, found that the goose-house was within the curtilage of the dwelling.] The argument for the traverser here, it will be observed, amounts simply to an adoption of the position maintained by Best, J., in Ilott v. Wilkes; and the law laid down, *contra*, by the learned American judge, so far back as 1842, confining the right to take a felon's life to cases of meditated felonies with force, is in conformity with the doctrine formulated by Sir J. Stephen in his "Digest of Criminal Law."

The English cases, stated in chronological order, are as follows:—Townsend v. Wathen[10] (1808) Jay v. Whitfield (1817), referred to in Ilott v. Wilkes,[11] (1820) and Lynch v. Nurdin,[12] Deane v. Clayton,[13] (1817) Bird v. Holbrook,[14] (1828) Jordin v. Crump,[15] (1841) and see those cases considered n Lynch v. Nurdin: Barnes v. Ward,[16] Clark v. Chambers,[17] Daniel v. Janes,[18] Wooten v. Dawkins,[19] and Bryan v. Eaton.[20] In the first of those cases (which, we apprehend, is still good law) it was held that every man must be taken to comtemplate the probable consequences of his acts, and, therefore, where the defendant caused traps scented with the strongest meats to be placed on his own land, so near to the plaintiff's house as to influence the instinct of the plaintiff's dogs and cats, and draw them irresistibly to their destruction, the defendant was held responsible to the plaintiff for the injuries he sustained thereby, although he had no intention of injuring the plaintiff, and meant only to catch foxes and vermin; it being held, further, that the defendant would be responsible for any injuries sustained by dogs tempted from the highway, or a public path, to the traps on the defendant's land, as he had no right to invite them there for the purpose of destroying them. And in the second case a boy who was thus injured recovered damages. But, in Deane v. Clayton the circumstances appearing gave rise to an equal division of judicial opinion. There the plaintiff, while sporting on certain land, started a hare, which ran into the defendant's woods, and against the will of the plaintiff, his dog followed the hare, and ran against some spikes fixed in the trees for the purpose of killing dogs, trespassing in pursuit of game, and was killed thereby. There were several public footpaths through the wood not fenced off, and notices were posted up that dog-spikes were set. Two of the judges held that an action for damages was sustainable. The law of England, said they, could not have justified the owner of the wood in killing the dog by shooting, and therefore it could not be killed indirectly; but they admitted that a dwelling-house may be protected by steel-traps and spring-guns, which may of course indirectly kill not only a robber but a mere trespasser, although the law of England does not allow that to be done directly. But, there is a fallacy here, said one of the two judges who held that an action would not lie. "Is it legal (he asked) to place spikes of glass upon a wall; and if a party climbing be thereby wounded or cut, can he bring an action? And yet if I were to see a trespasser going down my area or getting over the garden wall, I could not drive a spike into his hand, or cut him with a piece of glass; and suppose that in the present case the spikes had been on the wall, and the plaintiff had been wounded in getting over it, could the action have been maintained?" The very case so presented subsequently arose in Bird v. Holbrook. But, meantime, Ilott v. Wilkes was decided, holding that, in an action for setting spring-guns on the defendant's land's, and negligently leaving them there, whereby the plaintiff (a trespasser) was injured, it was

[10] 9 East 277.
[11] 3 B. & Ald. 304.
[12] 1 Q. B. 29.
[13] 7 Taunt. 488.
[14] 4 Bing 628.
[15] 8 M. & W. 782.
[16] 9 C. B. 470.
[17] 3 Q. B. D. 327.
[18] 2 C. P. D. 351.
[19] 2 C. B. N. S. 412.
[20] 40 J. P. 213.

a good defense to show that the plaintiff had notice that the guns were set there. Whereas in Bird v. Holbrook, it was held that a party was liable in respect of mischief occasioned by the setting of spring-guns, without notice, in the day time, in a walled garden. There it appeared that a florist had valuable tulips in his garden, and to protect them set a spring-gun, without giving notice, and a youth, who got into the garden in pursuit of a stray fowl, ran his foot against the secret wire and was shot. Just previously the statute 7 & 8 Geo. IV., c. 18, had been enacted, rendering it penal, in certain cases, to place spring-guns, even with notice, but still allowing them to be set in dwelling-houses between sunset and sunrise; nor does it prohibit the setting of dog-spears, etc., if for the mere purpose of destroying dogs trespassing in pursuit of game, and not of destroying human life. And therefore, the owner of a dog, going with it through a wood has even still no right of action against the owner of the wood for damages caused by the death of, or injury to the dog, which, by reason of its own natural instinct, and against its master's will, runs off the path against a dog-spear, as held in the subsequent case of Jordin v. Crump. Nor is it *per se* illegal to set a trap in a garden or field to kill vermin, or even dogs and cats: Bryan v. Eaton[21] (1876). Nor is the placing of poisoned flesh in an inclosed garden, for the purpose of destroying a dog which was in the habit of straying there, an offense punishable under 24 & 25 Vic., c. 97, s. 41, with reference to unlawfully and maliciously killing or maiming animals; but, *semble*, it would be an offense within the Poisoned Flesh Prohibition Act, 1864.[22] Analogous to the latter statute is the Poisoned Grain Prohibition Act, 1863.[23] While the Act of Geo. IV. has been re-enacted by 24 & 25 Vic., c. 100, s. 31; under which, however, it has been held that an engine simply intended to give alarm by explosion is not a "spring-gun," and a trespasser, though in a degree injured thereby, cannot recover for such injury.[24]

Sawyer v. Neale, was a case in which redress was sought in an action for damages. It came before May, C. J., on July 9th, on appeal from a decision by the County Court Judge, dismissing a civil bill on the merits, which was brought to recover for the loss sustained by the poisoning of two retriever dogs. The parties held adjoining farms, and Neale (whose sheep had been injured by dogs) had placed small pieces of poisoned meat on his land, and had caused notices thereof to be posted up on the gate piers and on the nearest police barracks. Sawyer, believing there was a public right of way (the existence of which was disputed in the evidence) across Neale's land, and ignorant that the land was poisoned, went across it with the dogs and they were unfortunately tempted to eat the meat, from which they died. In support of the appeal, Townsend v. Wathen,[25] was cited. For the defendant, *contra*, reliance was placed on Jordin v. Crump,[26] and it was contended that the only remedy, if any, was the penal one provided by the Poisoned Flesh Prohibition Act, 1864, but that here the defendant had complied with the statute, by posting the notices. In the opinion of May, C. J., Jordin v. Crump was not similar to the case in hand, because there could be no question that dog-spears could not allure a dog. However, here he did not consider there was an allurement either, near to a public highway; and the owner of the land gave notice in the way required by the Act of Parliment,[27] that the place was poisoned. It was not as if there were a highway near the place, and that the dogs had been tempted thither from the highway by strong-scented meats, as in Townsend v. Wathen. And he, therefore, affirmed the decision of the court below, with costs.

We can only say that, in our opinion, if a correct view was taken of the facts as to the right of way and the description of the meat in Sawyer v. Neale, the law also was properly applied. But the case, both as to the facts and law, would seem to be extremely near the verge. The decision, however, is the more satisfactory, as the defendant had been only trying to protect his sheep from being worried by dogs, and not merely poisoning the land for the prevention of poaching. It

[21] 40 J. P. 213.
[22] 27 & 28 Vic., c. 115, s. 2; Daniel v. Janes, *ubi supra*.
[23] 26 & 27 Vic., c. 113.
[24] Wootkin v. Dawkins, *ubi supra*.
[25] 9 East 277.
[26] 8 M. & W. 782.
[27] 27 & 28 Vic., c. 115.

was in condemning the ferocious machinations of game preservers, when commenting on Ilott v. Wilkes, that Sydney Smith said, "The greatest curse under heaven (witness Ireland) is a peasantry demoralised by the barbarity and injustice of their rulers."

The principles laid down in the cases under consideration possess an important collateral efficacy, applying as they do to circumstances in which the user of dangerous instrumentalities and appliances is not resorted to for the mere protection of property, and involving such general questions as the right of trespassers to recover for injuries caused by negligence, and the doctrine as to contributory negligence by children. Bird v. Holbrook, indeed, is a leading case on the latter subject, and was discussed, accordingly, in the well-known case of Lynch v. Nurdin—the latest decisions on the question being (in England) Mangan v. Atterton,[28] doubted, however, in Clark v. Chambers;[29] (in Scotland) M'Gregor v. Ross,[30] decided in March last; and (in America) Baltimore, etc. R. Co. v. Schwindling.[31] Mr. Campbell, in his work on the Law of Negligence,[32] refers on this question to the Scottish case of Campbell v. Ord;[33] and Mr. Smith, in his work on the same branch of law, in treating on dangerous excavations near highways, refers[34] to the American case of Howland v. Vincent,[35] adding, however, that, according to American text-writers, it is of doubtful authority. It is of interest, therefore, to state that we find Howland v. Vincent cited without disapproval, and acted on in the case of Omaha, etc. R. Co. v. Martin;[36] while we find Campbell v. Ord largely discussed in M'Gregor v. Ross. Having limited the subject of discussion here, however, to the law directly bearing on the user of dangerous instrumentalities merely for the purpose of protecting property, it would be out of place to enter upon the wider field of inquiry thus collaterally presented, and it must suffice, following out the intention indicated at the outset, to refer, in conclusion, to the decision in M'Gregor v. Ross, in which the authority of Ilott v. Wilkes, and Bird v. Holbrook was expressly invoked.

It there appeared that a punching and clipping machine was brought to a dock quay to be used in repairing a vessel. Being found, early in the day on which it was brought to the quay, to be out of gear and of no use for the purpose in question, it was left standing on the quay, but was securely tied with a rope, in such a way as to prevent the machinery being moved. After dark, on the evening of the same day, and after the rope had been removed by some person unknown, several boys were engaged playing with the machine by turning the handle and setting the wheels in motion — such machines, as Mr. Campbell writes, appearing to have "a peculiar fascination for children of the ages of seven and four." The youngest of the little playmates on this occasion, a child of four years old, had his arm severely injured by being caught between the wheels; and his father brought an action for damages against the owners of the machine, founded on alleged negligence on their part in not sufficiently guarding and securing it. The defenders averred that they had sufficiently tied the machine, and that the pursuer's son or some one else had cut the fastenings; and they pleaded that, having duly and sufficiently tied it, they were entitled to absolvitor; also, pleading contributory negligence on the boy's part, and on that of the pursuer, in allowing him to be at play in the place at question. The Sheriff-Substitute, by whom the case was heard in the first instance, was of opinion that the pursuer was entitled to recover. The defenders, he thought, were to blame for not taking effectual precaution against accident, as they might have done by using a padlock and chain, and so prevent the temptation to "shooing" or swinging on the handle, a temptation, he added, "probably almost irresistible to children, for it is as natural to them to 'shoo' where there is anything to 'shoo' upon, as it is for ducks to swim." Nor did he think that the plea of contributory negligence had been established in fact. Referring to Campbell v. Ord, he said that its circumstances were the same in all material points, except one, namely, that there the machine had been left in a public place without any fastening, even of rope;

[28] L. R. 1 Ex. 229.
[29] 3 Q. B. D. 439.
[30] 20 Scot. L. Rep. 462.
[31] Reported in the July number of the *American Law Register*.
[32] 2d ed., p. 188.
[33] 1 R. 149.
[34] At p. 32, n.
[35] 10 Metc. 371.
[36] Published in the *Reporter* (Boston) of June 4, 1883.

but, he thought that a rope fastening, which was so insecure as to be easily removed by the boys who were known to resort to the quay, which was so removed before the pursuer's child reached the spot, and which was not the ordinary or recognized fastening for such machines, was no better than no fastening at all. The defenders appealed to the sheriff, who reversed this judgment. He was unable to countenance the view that the defenders were bound to guarantee the safety of the public, and that having placed a dangerous machine in a public place, they were able for any damage which might be caused by it, no matter what precautions they took to secure it. In all the cases relied on by the pursuer in support of this proposition, the primary cause of injury was either in itself unlawful, or was one which the person held liable did at his own risk." So, in the recent case of Burton v. Moorehead,[37] and Clark v. Chambers.[38] "Again, in the case of Bird v. Holbrook, it was held that a person who set a spring-gun in his garden was liable in damages for injuries sustained by a trespasser; and the case of Ilott v. Wilkes is an authority to the same effect—the ground of judgment being that the use of such instruments was unreasonably disproportioned to the end to be obtained, and dangerous to the lives of human beings." Whereas, here it was not unlawful for the defenders to place the machine where it stood. As to Campbell v. Ord, the machine there was placed, not for use, but for sale, in a public street, and the accident occurred in the day-time when the streets were thronged with children; and the owner, though repeatedly warned that it was dangerous, had taken no precautions whatever to render it safe. Here the defenders had used reasonable, if not the best means, to prevent the damage. There were, also, strong grounds for contending, though it became unnecessary for him to decide, that the plea of contributory negligence was established; and, he added, "it has never been decided as a matter of law, and it is not the law, that a child of tender years is incapable of contributory negligence, although his age is an important element to be taken into consideration in deciding the question of fact whether he has contributed or not." The pursuer appealed to the Court of Session, whereupon it was held (diss. Lord Craighill) that the defenders had secured the machine in such a way as to make it reasonably safe against accidents, unless the fastenings were deliberately interfered with, and was therefore not liable. The dissentient judge considered it unnecessary to make any other observation on the plea of contributory negligence, than that it was determined by the decision in Campbell v. Ord, the pursuer's son being only four years of age; but, agreeing with the sheriff-substitute, he held that the defenders had not taken reasonable precautions to guard the machine. Lord Young said, "There can be no contributory negligence by a child of four years old. In such a case the contributory negligence can only be on the part of the parent in allowing the child to go out unattended. That is not the case here. It entirely turns on the question of the fastening being such as to be secure against accident." And he thought that, "where a machine is left on the quay which is safe against accidents, though not against deliberate changes made on its position or condition, it is reasonably safe so as to relieve the owner of responsibility for an accident in consequence of its being deliberately and of purpose interfered with by somebody else." "I do not think this case belongs to the same category, as Campbell v. Ord," said the Lord Justice-Clerk, "I think it is not only different in circumstances but entirely different in principle. There the machine was left in the market place unwatched and unsecured, and the child strayed up to it, and got hurt, and it was held, first, that there had been no contributory negligence, and secondly, that the machine was not secured. The injury to the boy there arose from the machine being improperly secured. But here this is not an accident in any sense. It was the result of the malicious act of some one else; and the question is, Is the owner answerable for deliberate and malicious interference with the machine which overcame measures of security which were sufficient to protect against accident if it were left alone. Now, as the machine here was left secure in a certain way, though perhaps not in the most efficient way, the case of Ord is clearly distinguishable from this one. It is

[37] *Supra.*
[38] *Supra.*

possible that the machine might have been better secured, but in the fact that it was secured at all lies the distinction of the present from that case."

As regards the question of contributory negligence this case would seem hardly consistent with Mangan v. Atterton, which, however, was doubted in Clark v. Chambers, but, as Mr. Campbell observes, it is well worthy of further consideration whether the facts in Mangan v. Atterton did not bring it within the principle of Bird v. Holbrook—the true principle being, as he maintains, that where the damage results immediately from a trespass, whether of child or man, the question is whether the defendant is chargeable with such heedlessness or rashness as, in its probable and natural results, is equivalent to the setting, without notice, of a dangerous trap or spring gun. At all events, what would amount to contributory negligence by an adult may not be so by a child of tender years.[39] But, it seems to us that what was decided in Mangan v. Atterton was that an action would not lie, no matter how blameless the child might have been, as there was no negligence (as to which our opinion differs) on the part of the defendant; whereas, in Bird v. Holbrook there was such gross negligence as the law equates to intentional mischief. It is one thing to carry the rights of property to the extent of justifying, for its protection, such a wanton user of dangerous instrumentalities, like spring-guns, as would lead to a species of impersonal assassination, and quite another thing to go to the contrary extreme of holding (as in the *reductio ad absurdum* put in a recent case in Pennsylvania),[40] that, by reason of its being a boy's nature to trespass, especially where there is tempting fruit, it becomes the duty of the owner of a fruit-tree to cut it down, because a boy trespasser may possibly fall from its branches.—*Irish Law Times.*

[39] Lay v. M. Ry. Co., 34 L. T. N. S. 30; Railway Co. v. Spearen, 47 Pa. St. 304.

[40] Gillespie v. M'Gowan, 12 W. N. 413.

CONDITIONS IN CONVEYANCES.

Conditions are frequently attached to conveyances, both by grantors in deeds and by testators in wills, and as we find the courts occasionally adjudging such conditions void and holding the estate has passed by the deed or will, unaffected by the condition, it becomes of great moment to know the principles on which some conditions are held valid and others void. A condition may be defined to be "the happening or not happening of some contingent event by which an estate may be created, enlarged or defeated."[1] They are of two kinds, viz , conditions precedent and conditions subsequent. No set form of words are necessary in the creation of either.[2] And whether or not conditions are imposed in conveyances is often a nice point for the courts to determine. But we propose to discuss only the effect of conditions and not the question of their existence.

I. As to Conditions Precedent.—A condition precedent is a condition upon the happening of which an estate will vest.[3] As if a grant be made to A upon his marriage, or a devise to B of lands, if he pay to C $100. It is not unfrequently difficult to determine whether the condition is precedent or subsequent. But this question must be determined by the intention of the grantor or testator, to be gathered from the instrument and existing facts. But "if the act or condition required do not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may as well be done after as before the vesting of the estate, or if from the nature of the act to be performed and the time required for its performance, it is evidently the intention of the parties that the estate shall vest and the grantee perform the act after taking possession, the condition is subsequent."[4]

Inasmuch as the estate does not vest when dependent upon a condition precedent, until the performance of the condition, if the condition is unlawful or impossible in performance, the dependent estate fails and the grant

[1] Washburn on Real Prop., ch. 14.

[2] Shepard v. Thomas, 26 Ark. 617.

[3] Moore v. Sanders, 15 S. C. 440.

[4] Underhill v. Saratoga R. Co., 20 Barb. 455; Barraso v. Madan, 2 Johns. 145; Finley v. Kingshepee, 2 Pet. 346; Ragan v. Walker, 1 Wis. 527.

or devise becomes wholly void and no estate vests.[5] Conditions in restraint of marriage generally are void, as being against public policy and good morals; and hence a grant or devise limited thus would vest the estate regardless of the condition.[6] But conditions not absolutely prohibiting marriage are valid. That is, such conditions as are reasonable and proper, as that one shall not marry a widow, or James or John, or a condition prescribing the manner or place of marriage, or one restraining a female from marrying a Scotchman, have all been held to be valid conditions.[7] But conditions in restraint of marriage, even though they be not absolute, if they in effect prohibit or unduly limit the opportunity for choice, are held invalid.[8]

It has been held in England, and is probably the law in this country, that a condition in general restraint of the marriage of the testator's widow, is valid.[9] Although in Waters v. Tazewell,[10] it was held that a provision in a marriage settlement, that the husband should not contract a second marriage, was contrary to legal policy and void. I can see no reason for the difference, unless it be for the sake of the offspring of the first marriage. If this is the reason, the condition must be held to be invalid if there were no children, or if they should all die. If this distinction does exist, and it seems to from the authorities quoted, it certainly will not long survive in this age, where the tendency is to place male and female on the same plane as to legal rights.

If the condition precedent required that the devisee or grantee should marry a certain person, an offer to marry the required person and a refusal on his or her part would be held to be a waiver of that condition, or perhaps, rather, it would be held that the testator or grantor intended to limit the condition by the unexpressed words, "if the consent of the designated party to such marriage can be obtained."

Where the condition precedent is copulative, consisting of several branches, the entire condition must be performed before the estate can vest. The grantee in a conditional deed, if he refuses or neglects to perform all the conditions upon which his title depends, forfeits his estate none the less because he may have paid some portion of its value. The estate reverts to the grantor as a matter of legal right, and, if he sees fit to enter for the breach of condition, and to claim a forfeiture, the estate reverts to him to all intents and purposes, without regard to the part performance or outlays which the conditional grantee may have made on account of it.[11] In construing conditions precedent, the courts adopt the most liberal construction possible in order to uphold the estate, and the courts will solve all doubts in favor of vesting the estate.

II. *As to Conditions Subsequent.*—A condition subsequent is one that operates upon an estate already vested and renders it liable to be defeated.[12] All that remains in the grantor is the possibility of reverter or right of entry, if the condition is broken. As in conditions precedent, the most liberal construction is to be given, so as to vest the estate, so, on the contrary, in conditions subsequent, the strictest constructions will be given, in order to preserve the estate already vested.[13] Therefore we find, in the great majority of cases, conditions precedent are held good, and conditions subsequent, void. Conditions subsequent not being favored in law.

Conditions subsequent, to be valid, must not be repugnant to the estate granted or devised. They must not be an exception to the very thing, that is to the substance of the gift; if so they are void, and the estate granted will stand unaffected by such conditions.[14] For instance in Moore v. Sanders,[15] the tes-

[5] Vanhorn's Lessees v. Dorrance, 2 Dal. 317; Taylor v. Mason, 9 Wheat. 325; Marten v. Ballou, 13 Barb. 119; Bertee v. Falkland, 2 Freem. 222. *Contra:* Jones v. Doe, 2 Ill. 276.

[6] Williams v. Cowden, 13 Mo. 211; Waters v. Tazewell, 9 Md. 291; Maddox v. Maddox, 11 Gratt. 804. The leading English case on this point is Scott v. Tyler, 2 White & Tudor's Leading Cases, 429.

[7] Little v. Birdwell, 21 Tex. 597; Vance v. Bampbell, 1 Dana, 229; McCullough's Appeal, 2 Jones, 197; Phillips v. Medbury, 7 Conn. 568; Commonwealth v. Stauffer, 10 Barr. 350; Mannerman v. Weaver, 8 Md. 517; Gough v. Manning, 26 Mo. 347.

[8] Maddox v. Maddox, 11 Gratt 804: Long v. Dennis, 4 Burr. 2052; Hartley v. Rice, 10 East, 22; Lowe v. Beers, 4 Burr, 2225; 1 Story's Eq. Jur. 283.

[9] Walsh v. Mathews, 11 Mo. 131; Dunney v. Schoefler, 24 Mo. 170; Phillips v. Medbury, 7 Conn. 568; Commonwealth v. Houffer, 10 Pa. St. 350. *Contra:* Parsons v. Winslow, 6 Mass. 178.

[10] 9 Md. 291.

[11] Rowell v. Jewett, 71 Me. 408.

[12] Memphis & Charleston R. Co. v. Neighbors, 51 Miss. 412.

[13] Hoyd v. Kimball, 49 N. H. 322; Page v. Palmer, 48 N. H. 385; Voris v. Renshaw, 49 Ill. 425.

[14] Blackstone Bank v. Davis, 21 Pick. 42; Moore v. Sanders, 15 S. C. 440.

[15] 15 S. C. 440.

tatrix gave her whole estate to her son, and in another clause, directed that if her son should die without leaving a will, then the whole estate should go to her grandchildren. This condition the court held repugnant to the estate in fee granted to her son inasmuch as the power of alienation is an essential feature of such an estate, and the condition required the son to die in the possession of the estate, for otherwise he could not pass it by will. Hence it was held that the condition was void, because it cut down the fee to a less estate and was repugnant to the fee already devised.

Even if the condition is valid and it be broken, still the estate does not *ipso facto* revert, but requires an entry, or some action equivalent thereto, by the grantor or the third person, who was to take the estate by limitation over, in order that the estate in the grantee be defeated.[16]

A condition may be broken, entitling the grantor to claim a forfeiture, yet if he afterward accept a performance he must be held to have waived the forfeiture,[17] although an exception to this rule is found in a forfeiture of a lease for non payment of rent, in which case there must be acceptance of rent accruing due, after the breach to constitute a waiver.[18]

It is not necessary, in order that advantage may be taken of a breach of a condition that there be injury caused by such breach to the grantor. But as to whether a grantor can take advantage of such breach, after he has conveyed all his interest in the premises to a third person, seems to be a *quere*.[19] Although upon principle it would certainly seem, that such grantor ought not to be allowed to be benefited by the breach. One entitled to insist on a forfeiture, may waive such forfeiture and sue for his damages for the breach of covenant, being permitted to pursue either remedy, he may elect,[20] though if he sue on his covenant, he will confirm the estate. While it is true, as stated, that conditions subsequent are not favored by the law, and are strictly construed, yet the cases are not infrequent, where such conditions have been held valid and perhaps an examination of a few on both sides will best illustrate the application of the principle.

While a condition altogether preventing alienation is absolutely void, and the estate passes to the grantee unencumbered by the limitation, yet a condition limiting the persons to whom the grantee may convey is good and valid, as is also one that the grantee shall not convey until he arrive at a given age.[21]

A condition that the estate shall revert to the grantor in case intoxicating liquors are sold thereon is a valid one,[22] and this, whether they are sold lawfully or not. So is one that a school house, destillery, powder house, hospital, cemetery, blast-furnace, livery stable, hotel or machine shop, shall not be erected upon the premises conveyed.[23]

The removal of a depot from a lot conveyed to a railroad company in consideration of the permanent location and construction of the depot thereon, was held to operate a reversion of the lot to the grantor.[24]

The grant of land upon condition that the grantee shall settle thereon, a specific number of families within a specified time is held to be a good condition subsequent, and its breach forfeits the estate.[25]

But conveyances, whether wills or deeds, conveying the fee to lands and attempting by condition subsequent, to limit the exercise by the grantee of the rights which are of the very essence of that estate are void.

So a condition in a conveyance that the land conveyed should not be subject or liable to conveyance or attachment, is void.[26]

[16] Norris v. Milner, 20 Ga. 563; Chalker v. Chalker, 1 Conn. 79; Dewey v. Williams, 40 N. H. 222; Lincoln etc. v. Drummond, 5 Mass. 321; Smith v. Brannon, 13 Cal. 107; Ruch v. Rock Island R. Co., 97 U. S. 693; Sperry v. Sperry, 8 N. H. 477; Southard v. Central R. Co., 26 N. J. L. 13; Reimer v. American Contract Co., 9 Bush. 202; Osgood v. Abbott, 58 Me. 73.

[17] Chalker v. Chalker, 1 Conn. 79; Jackson v. Crysler, 1 John's Cases 126; Coon v. Breckett, 2 N. H. 163.

[18] Hunter v. Osterhoudt, 11 Barb. 33; Jackson v. Allen, 3 Cow. 220; Wood on Landlord & Tenant, 531.

[19] Gray v. Blanchard, 8 Pick. 284; Ruch v. Rock Island, etc R. Co., 97 U. S. 693; Underhill v. Saratoga R. Co., 20 Barb. 455.

[20] Stuyvesant v. The Mayor, 11 Paige Ch. 414.

[21] Dougal v. Fryer, 3 Mo. 40; Stewart v. Brady, 3 Bush. 623; McWilliams v. Nisley, 7 Am. Dec. 654; 1 Washb. Real Prop. 80.

[22] Cowell v. Colorado Springs Co., 3 Col. 22; s. c. 100 U. S. 55; Plumb v. Tubbo, 41 N. Y. 442; O'Brien v. Wetherill, 14 Kas. 616; Collins Mfg. Co. v. Marcy, 25 Conn. 241.

[23] Collins Mfg. Co. v. Marcy, 25 Conn. 241; Craig v. Wells, 11 N. Y. 315; Gray v. Blanchard, 8 Pick. 284; Sperry v. Pound, 50 Ohio 189; Nicholls v. Erie R. Co., 12 N. Y. 121; Stines v. Dooman, 25 Ohio St. 580.

[24] Indiana, Penn. etc. R. Co. v. Hood, 66 Ind. 580.

[25] Chapman v. Pingree, 67 Me. 198.

[26] Blackstone Bank v. Davis, 21 Pick. 42; McCleany

In the Michigan case of Maudlebaum v. McDonell,[27] Justice Christiancy says: "That a condition or restriction which would suspend all power of alienation for a single day, is inconsistent with the estate granted, unreasonable and void."

A condition in a will, that a certain farm "fall into possession of W, laying this injunction and prohibition not to leave the same to any but the legitimate heirs of W's family at W's death" was held to be a void condition.[28]

Upon a view of all these cases we conclude that the test as to whether a condition subsequent is valid or void, when attached to a conveyance of a fee is, can the estate be reconveyed and the subsequent grantee take it subject to such condition.

Emporia, Kas. E. W. CUNNINGHAM.

v. Ellis, 54 Iowa 311; DePeyster v. Michael, 6 N. Y. 467; Walker v. Vincent, 19 Penn. St. 369; Hall v. Tufts, 18 Pick. 455; Maudlebaum v. McDonell, 29 Mich. 78; Moore v. Sanders, 15 S. C. 440.

[27] 29 Mich. 78.

[28] McCullough v. Gilmore, 11 Pa. St. 370.

NEGOTIABLE PAPER — ASSIGNMENT NOT EQUIVALENT TO INDORSEMENT.

OSGOOD v. ARTT.

United States Circuit Court, Northern District of Illinois.

1. By the rules of the law merchant, the purchaser of negotiable paper, payable to order, unless it be indorsed by the payee, takes subject to any defense which the payor has against the payee. He becomes, in such case, only the equitable owner of the debt or claim evidenced by the security.

2. As a general rule, the legal title to negotiable paper, payable to order, passes only by the payee's indorsement on the security itself, or on a piece of paper, so attached to the original instrument, as, in effect, to become a part of it, or incorporated into it.

3. Words of assignment and transfer, contained in a separate instrument, executed for a wholly different and distinct purpose, are not equivalent to an indorsement within the settled rules of the law merchant.

4. A subsequent indorsement made after notice of the payor's defense, although the paper was purchased without notice of defense, will not relate back to the time of purchase, so as to cut off the equities of the payor against the payee.

HARLAN, Circuit Justice, delivered the opinion of the court:

On the 14th day of May, 1856, the defendant Artt executed and delivered to the Racine, etc. R. Co. his note, whereby, for value received, he promised to pay to that company, or order, at the expiration of five years from May 10, 1856, the sum of $2,500, together with interest at the rate of ten per cent. per annum, payable annually on the 10th day of May of each year, principal and interest payable at the office of the company in Racine, Wisconsin. At the same time Artt, to secure the payment of the note, executed to the company his mortgage upon certain real estate in Carroll County in this State.

Subsequently, the company made its bond, under date of June 10, 1856, whereby it acknowledged that the company was justly indebted to, and promised to pay, Charles Osgood or bearer, $2,500, on the 10th day of May, 1861, at their office in the city of New York, together with interest from and after the 10th day of May, at the rate of ten per cent. per annum, payable semi-annually on each 10th day of November and May, upon the presentation and surrender of the interest coupons at the said office. That bond contained these clauses: "To the payment whereof the said company herein bind themselves firmly by these presents; and for the better security of such payments being made to the holder thereof, the said company have assigned and transferred, and by these presents do assign and transfer to the said holder of this bond, a certain note for the sum of $2,500, executed by Robert Artt, of Carroll County, together with a mortgage given collateral to and for the purpose of securing the payment of the same, dated on the 14th day of May, 1856, payable in five years from the 10th day of May, 1856, with interest at the rate of ten per cent. per annum, which said note and mortgage are hereto appended, and are transferable in connection with this bond, and not otherwise, to any parties or purchasers whomsoever. And the said company do hereby authorize and empower the holder of this bond at any time, in case said company shall fail to perform any of the foregoing stipulations by neglecting to pay either principal or interest on this bond when the same shall become due, to proceed and foreclose the said mortgage, or take such other legal remedy on said note or mortgage against said mortgagor, or against this company on this present bond, or on both, as shall seem proper and expedient to said holder hereof."

Some time in the summer of 1857 the railroad company sold the bond, delivering therewith the note and mortgage, to plaintiffs' intestate—the bond, note and mortgage being attached firmly together with eyelets in the order in which they are named, the bond on the top, next the note, and then the mortgage. The bond, note and mortgage each bears the number 1,964 written thereon in ink. At the time of said purchase and delivery Osgood had no notice of any defense to the note, nor of any of the matters alleged in the defendant's third plea. That plea states facts which are conceded to show a good defense as between Artt and the railroad company, viz., an entire failure of consideration, and also fraud, upon the part of the company, in procuring the execution of the note and mortgage. The note

bond and mortgage, after their delivery to the deceased, remained attached in the manner just stated. Upon the back of the note are the words "Racine & Mississippi Railroad Company, by H. S. Durand, president," which is the indorsement of the railroad company, placed thereon by its authority. It had not, however, been placed thereon when Osgood purchased and received the note, bond and mortgage, but was made at some date subsequent to June, 1859. Before the indorsement was, in fact, made on the note, but after the purchase by Osgood he had notice as well of the fraud practiced by the railroad on Artt, as of the failure of consideration in the note, as set out in the defendant's third plea.

These facts have been specially found by a jury, and the sole question for determination is whether, upon this finding, the plaintiffs are entitled to judgment. Tho only issue of fact made on the third plea is whether Osgood, prior to the indorsement of the note, had notice of the alleged fraud and failure of consideration.

1. It is a settled doctrine of the law merchant that the *bona fide* purchasers for value of negotiable paper, payable to order, if it be indorsed by the payee, takes the legal title unaffected by any equities which the payor may have as against the payee.

2. But it is equally well settled that the purchaser, if the paper be delivered to him without indorsement, takes, by the law merchant, only the rights which the payee has, and, therefore, takes subject to any defense the payor may rightfully assert as against the payee. The purchaser, in such case, becomes only the equitable owner of the claim or debt evidenced by the negotiable security, and, in the absence of defense by the payor, may demand and receive the amount due, and, if not paid, sue for its recovery, in the name of the payee, or, in his own name, when so authorized by the local law.

3. As a general rule the legal title to negotiable paper, payable to order, passes, according to the law merchant, only by the payee's indorsement on the security itself. The established exception to this rule is where the indorsement is made on a piece of paper, so attached to the original instrument as, in effect, to become part thereof or be incorporated into it. This addition is called, in the adjudged cases and elementary treatises, an *allonge*. That device had its origin in cases where the back of the instrument had been covered with indorsements or writing, leaving no room for further indorsements thereon. But, perhaps, an indorsement upon a piece of paper attached, in the manner indicated, would now be deemed sufficient to pass the legal title, although there may have been, in fact, room for it on the original instrument.

4. But neither the general doctrines of commercial law, nor any established exception thereto, make words of mere assignment and transfer of such paper—contained in a separate instrument, executed for a wholly different and distinct purpose—equivalent to an indorsement within that rule which admits the payor to urge, as against the holder of an unindorsed negotiable security, payable to order, any valid defense which he has against the original payee.

5. The transfer of the note in suit, by words of assignment in the body of the railroad company's bond, did not, in the judgment of the court, amount to an indorsement of the note, although the bond, note and mortgage were originally fastened together by eyelets. The facts set out in the third plea, and sustained by the special finding, constitute, therefore, a complete defense to the action, unless, as contended by plaintiffs, the subsequent indorsement, in form, by the railroad company, after Osgood was informed of Artt's defense, had relation back to the time when the former, without notice of such defense, purchased the note for value, then paid. If, at the time of Osgood's purchase, it had been agreed that the company should indorse the note, but the indorsement was omitted by accident, or mistake, or fraud, upon the part of the company, a different question would have been presented. But no such case is presented by the special finding. It is entirely consistent with the facts that the indorsement by the company was an afterthought, induced by notice of Artt's defense, and was not within the contemplation or contract of the parties when Osgood purchased the bond. Moreover, and as a circumstance significant of an intention to restrict, in some degree, the assignability of the note and mortgage, it is expressly stipulated, in the company's bond, that they are transferable in connection with the bond, and not otherwise.

I am of opinion that the facts which came to Osgood's knowledge prior to the indorsement, and which, in substance, constitute the defense set out in the third plea, furnished notice that the company had, by reason of fraud and failure of consideration, lost its right to demand payment of the note from Artt. By the indorsement, after such notice, Osgood could not acquire any greater rights than the company possessed. He did not become the holder of the note by indorsement, as required by the law merchant, until after he had notice that the company could not rightfully pass the legal title, so as to defeat Artt's defense.

While the adjudged cases are not in harmony upon some of these propositions, the conclusions indicated are, in the opinion of the court, consistent with sound reason, and are sustained by the great weight of authority.*

The facts specially found do not authorize a judgment for the plaintiffs.

* Chief Justice Marshall, in Hopkirk v. Page, 2 Brock. 41; Sturges' Sons v. Met. Nat. Bank, 49 Ill. 231; Melendy v. Keen, 89 Ib. 404; Haskell v. Brown, 65 Ib. 37; Lancaster Nat. Bank v. Taylor, 100 Mass. 24; Bacon v. Cohen, 12 S. & M. 522; Grand Gulf Bank v. Woods, Ib. 482; Clark v. Whitaker, 50 N. H. 474; Haskell v. Mitchell, 53 Me. 468; Franklin v. Twogood, 18 Iowa, 215; French v. Turner, 15 Ind. 59; Folger v Chase, 18 Pick. 63; Whistler v. Forster, 14 C. B. 246 (108 E. C. L. 248); Harrop v. Fisher 10

INSURANCE — LIMITATIONS ON RIGHT TO SUE CONTAINED IN POLICY.

SPARE v. HOME MUT. INS. CO.*

United States Circuit Court. District of Oregon, August 13,1883.

1. A policy of insurance against fire issued by the defendant provided that a loss thereunder should be payable sixty days after proof thereof; and that a suit for the recovery of any claim under the policy should be brought within twelve months after the loss occurred: *Held*, that the twelve months did not commence to run until the loss was due and payable—the expiration of the sixty days after the proof of the same.

2. A clause in a policy providing that the same shall be void if assigned after a fire is illegal, and such assignment is valid, and carries with it the right to maintain a suit to correct a mistake therein.

3. The owners of a warehouse being indebted to the plaintiff agreed to insure the same against fire for his benefit, and accordingly agreed with the defendant for such insurance in their name with loss payable to the plaintiff, but by mistake the plaintiff's name was written in the policy as the assured and owner of the property; a loss occurred within the period of the risk, and after proof of loss by the owners and adjustment by the defendant, the former assigned the policy and their rights to the plaintiff: *Held*, on the demurrer that the equity of the case was with the plaintiff, and he was entitled to have the contract reformed according to the true understanding and purpose of the parties thereto.

George H. Williams and *W. Scott Bebee*, for the plaintiff; *Cyrus A. Dolph*, for the defendant.

DEADY, J., delivered the opinion of the court:

This suit was brought by a citizen of Oregon against a corporation formed under the laws of California to reform a policy of insurance and recover an alleged loss thereunder as reformed.

It appears from the bill that on July 26, 1881, Aaron and Ben Lurch were doing business as Lurch Bros., at Cottage Grove, Oregon, and were the owners of a warehouse there of not less than $1,000 in value, and that at and before said date they were indebted to the plaintiff in a sum exceeding $1,000, and to secure him in the payment of the same it was agreed that they should insure the warehouse against loss by fire for the sum of $900 in their own names for his benefit, and that in pursuance of said agreement it was agreed between Lurch Bros. and the defendant that the latter would insure said property accordingly; that on July 26, 1881, the defendant delivered to said Lurch Bros. its policy of insurance on said warehouse against loss by fire for the period of one year, in the sum of $900—describing it as "his one-story frame warehouse occupied by the assured for the storage of grain only," but that in the execution of the policy the plaintiff's name was by mistake inserted therein as the assured, instead of that of Lurch Bros., and that the provision that the loss, if any, should be payable to the plaintiff, was omitted therefrom; that on February 14, 1882, said warehouse was totally destroyed by fire, and on March 24, thereafter, Lurch Bros. furnished the defendant with the proof of loss, and the same was duly adjusted by it at $900; and that the plaintiff was not aware of the mistake in the policy until after the loss, and Lurch Bros. have since assigned the same, together with all their rights thereunder to the plaintiff.

The defendant demurs to the bill, and for cause thereof alleges: 1 that the suit is not brought within the twelve months limited therefor by the policy; 2, that the policy was void from its inception; 3, that the policy became void by assignment thereof to the plaintiff contrary to its terms; 4, that the plaintiff is not the real party in interest; and 5, that the plaintiff is not entitled to any relief against the defendant.

The policy is annexed to the bill, and to understand the particular grounds of the demurrer some of its voluminous clauses must be stated—as, for instance: The assured shall give immediate notice and proof of any loss. Such loss is to be paid in sixty days after due notice and proof of the same. If the policy is assigned before or after a fire the same shall be void. "That no suit for the recovery of any claim by virtue of this policy shall be sustained unless commenced within twelve months next after the loss shall have occurred; and should any such suit be commenced after the aforesaid twelve months, the lapse of time shall be taken as conclusive evidence against the validity of such claim."

The bill in this case was filed on April 28 and the subpœna thereon was issued and served on May 1, 1883. By rule 6 of this court a party filing a bill must cause proper process to issue thereon and endeavor to have the same served within ninety days from such filing, or it may be dismissed for want of prosecution on the motion of any defendant who has not voluntarily appeared thereto. Under this rule this suit was commenced when the bill was filed; and for aught that has been shown, such was the effect of filing the bill without the rule. However, the bill was not filed until fourteen months and fourteen days after the fire occurred.

On the authority of adjudged cases (Davidson v. Phœnix Ins. Co., 4 Saw. 594; Riddlesbarger v. Hartford Ins. Co., 7 Wall. 389; May on Ins., sec. 478), it is admitted by counsel for the plaintiff that this clause in the policy, limiting the time within which a suit may be commenced thereon against the defendant is valid, but they contend that it must be read in connection with that other clause which provides that a loss does not become payable until sixty days after the proof of that

C. B. N. S. 196; Gibson v. Minet, 1 H. Bl. s. p. 606; Story on Notes, sec. 120; Story on Bills, sec. 201; Chitty on Bills (12th Amer. from 9th Lond.) 252; 2 Parsons on Notes and Bills. 1, 17 and 18; 1 Daniel on Nego. Inst. (31 ed.) secs. 634*a*, 683*a*, 690, 741 and 748*a*

* See report of case between same parties, 16 Cent. L. J. 352.

fact is made; and that taken together the reasonable construction of them is, that the right to sue on the policy being postponed until the loss is payable—namely, sixty days after proof thereof—the twelve-months limitation upon such right does not commence to run until that time. This construction is supported by the decided weight of authority, and in my judgment is correct on principle. The Mayor, etc. v. Hamilton F. Ins. Co., 39 N. Y. 45; Hay v. Star F. Ins. Co , 77 N. Y. 241; Barber v. F. & M. Ins. Co., 16 W. Va. 658 (s. c., 37 Am. Rep. 800); Chandler v. St. Paul F. & M. Ins. Co., 21 Minn. 85; Steen v. Niagara F. Ins. Co., 89 N. Y. 315; (s. c., 42 Am. Rep. 297); May on Ins., sec. 479.

The language of this policy is that of the defendant, and any ambiguity in its terms must be resolved against it. Taken literally, the clause limiting the time within which the defendant may be sued does provide that a suit on the policy must be commenced within twelve months after the loss has occurred, but the policy also provides that the loss is not payable until sixty days after proof of the fact, and even then the defendant may give notice of its intention not to pay but to repair or replace. A stipulation that a suit may or must be brought within twelve months from a certain time, implies that the party has the whole twelve months for that purpose—that he may commence a suit on the first day of such period. But if it can not be commenced until two months of the time has expired, then, in reality, only ten months are given in which to sue. Under this policy, the period within which a suit may be brought, ought to begin at the time when by its terms it can be commenced—when the loss is established and the claim therefor is due and payable.

In Steen v. Niagara F. Ins. Co., 89 N. Y. 299, the policy contained two similar conditions, and the court, in construing them, said: "We think the intention of the defendant was to give the insured a full period of twelve months, within any part of which he might commence his action, and having by postponement of the time of payment, secured itself from suit, it did not intend to embrace the period within the term after the expiration of which it could not be sued. In other words, the parties can not be presumed to have suspended the remedy and provided for the running of the period of limitation during the same time. Indeed, the actual case is stronger; not only was the remedy postponed, but the liability even did not exist at the time of the fire, nor until it was fixed and ascertained according to the provisions of the policy. Having thus made the doing of certain things, and a fixed lapse of time thereafter, conditions precedent to the bringing of an action, the parties must be deemed to have contracted in reference to a time when the insured, except for that condition, might be in a condition to bring an action. Under any other construction, the two conditions are inconsistent with each other."

The objection that the policy is void is based upon the fact disclosed in the bill, that the assured, as the policy is written, has no interest in the property insured. But this is alleged to be the result of a mistake, by which the property was insured in the name of the plaintiff instead of that of the owners for his benefit, which mistake this suit is brought to correct. Neither has the policy become void by the assignment to the plaintiff. The stipulation that the policy shall be void if assigned before a fire, without the consent of the defendant, is valid. While the risk is active or pending, the contract is personal, and the policy can not be assigned without the consent of the insurer. But the stipulation that the policy shall be void if so assigned after the fire, stands on a different footing. When the proof of loss was made, and the liability of the defendant under the policy fixed, the relation between the parties was changed from insurer and insured to that of debtor and creditor, and the *delectus personæ* of the contract was no longer material. Therefore this second stipulation is null and void, because it is intended to prevent the assignment of a chose in action contrary to the policy of the law. Wood on Fire Ins., secs. 94, 337, 340, 342 and cases there cited.

By the assignment of this policy to the plaintiff, he certainly became the real party in interest therein, as it then stood, and is entitled, as such assignee, to recover from the defendant whatever sum was then due thereon from it to his assignors. If the assignment also carries with it the right to have the policy reformed in equity, as I think it does (Story's Eq. Jur., sec. 165), the plaintiff is also the real party in interest in that aspect of the case, he being the person for whose benefit the insurance was effected.

The alleged mistake in this case appears to be a proper one for the interference of a court of equity. The objection that the plaintiff is asking the court to make a new contract between the two parties, might be urged against any application of this nature. To reform a contract or correct a mistake in one, is to change the language of it in some material particular concerning the subject-matter or parties thereto. When reformed, as compared with the contract contained in the imperfect or erroneous writing, it may be said to be a new one, but in fact it is the true and only contract between the parties. The defendant has had the benefit of the premium paid on this risk by these parties. But by reason of the plaintiff being erroneously named in the policy as the assured, instead of the owners thereof, it is not liable, as the policy stands, to pay the loss incurred and insured against to any one. Upon the transaction as stated in the bill, there is a strong implication that there was a mistake in this particular. Spare, who is merely a creditor of the owners, does not appear to have had an insurable interest in the property, and therefore any insurance in his name was nugatory. Spare v. Home M. Ins. Co., 8 Saw. 618. Lurch Bros. were the owners

of the property, and they wished to insure it for the benefit of Spare, their creditor. As this could only be done by insuring it in their own names for his benefit, it is not unreasonable to suppose that such was the understanding or agreement. Either this must have been the case, or the parties more intent upon the end to be accomplished than the choice of proper means, carelessly or ignorantly effected the insurance in the name of Spare, rather than their own. But the bill alleges that the agreement was to insure in the name of the owners for the benefit of the creditor, and that the mistake occurred in the writing of the policy; and this the demurrer admits to be the truth. See Brugger v. State Invest. Ins. Co., 5 Saw. 304.

Putting aside the technical points made in the argument for the defendant, the equities of this case, as stated in the bill, are all with the plaintiff. An insurance on this property was duly effected for his benefit; and whether the mistake in the name of the assured was made in the application for the insurance or in reducing the understanding of the parties to writing in the policy, is in justice and right of no material consequence to the defendant.

The demurrer is overruled.

CHATTEL MORTGAGE BY PARTNERSHIP—RECORDING.

GRANGER v. ADAMS.

Supreme Court of Indiana, May Term, 1883.

A mortgage of goods executed by a partnership must be recorded in each of the counties where the partners reside.

ELLIOTT, J., delivered the opinion of the court:

The question which this record presents is this: Is a mortgage on partnership personal property, executed by one partner in behalf of the firm, recorded in the county where the property is situated and the business of the partnership conducted, and where the partner executing it resides, but not recorded in the county where the other members of the firm reside, valid as against creditors?

It is settled that a mortgage, if good where possession is retained by the mortgagor, is not valid as against creditors, unless executed and recorded in strict accordance with the statute. The common law did not recognize the validity of such instruments as against creditors, and the cases are well agreed that one who asserts a right under such an instrument, paramount to the claims of creditors, must show that all has been done that the statute requires. At common law possession was essential to the validity of the mortgage as against the mortgagors. Registration is made by law the substitute for possession, and in order that registration shall have this effect it must be such as the statute prescribes.

Our statute provides that "no assignment of goods by way of mortgage shall be valid as against any other persons than the parties thereto, where such goods are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage shall be acknowledged as provided in cases of deeds of conveyance, and recorded in the recorder's office of the county where the mortgagor resides, within ten days after the execution thereof. This provision makes it essential to the validity of a chattel mortgage executed by two or more persons residents of different counties, that it shall be recorded in each of the several counties. De Courey v. Collins, 21 N. J. Eq. 33; Rich v. Roberts, 48 Me. 248.

The fact that the mortgage is executed by a partnership composed of several members does not change the rule. All the partners are mortgagors, and as the firm can have no place of residence the residence of the mortgagors must be that of the individuals composing the partnership.

In ordinary legal proceedings the partnership is reached through the individual partners. If an action is brought against partners, process must be served upon each member of the firm; if actions are instituted it must be in the name of all the members. The act of the partnership is the act of all the partners, the firm representing them in the act. Dickson v. Indianapolis, etc. Co., 63 Ind. 9; Crosly v. Jerolman, 37 Ind. 264.

It seems clear upon principle that a mortgage of goods executed by a partnership must be recorded in the counties where the partners reside, and so the authorities declare. Stewart v. Platt, 101 U. S. 731; Kaul v. Rice, 10 N. B. Reg. 746; De Courey v. Collins, *supra*. In the case of Hubbardston Lumber Co. v. Covert, 35 Mich. 254, a somewhat different doctrine is laid down, but that case is very essentially restricted by the later case of Briggs v. Leitell, 44 Mich. 79, wherein it is declared that the former decision does not apply to cases where all the partners are residents of the State.

Judgment affirmed.

NEGOTIABLE PAPER — RESTRICTED INDORSEMENT.

ARMOUR BROS. BANK v. BANK.

Supreme Court of Kansas, July Term, 1883.

1. An indorsement "pay B or order, for account of C," is a restricted indorsement, vests no general property in B, but simply constitutes him the agent of C for the purpose of collection.

2. Such an indorsement is a contract in writing, and not subject to contradiction by parol testimony.

3. Where a petition sets out a specific title, followed by a general averment of ownership, it will be understood that this general averment refers to the specific title, and the testimony will be limited to such title.

Error from Riley County.

Green & Hessin, for plaintiff in error; *Spilman & Brown*, for defendant in error.

BREWER, J., delivered the opinion of the court:

The plaintiff in error, plaintiff below, brought an action against the defendant in error on the following draft:

"$1,000.00. Manhattan, Kan., Dec. 7, 1881.

At sight, pay to the order of J. K. Winchip, cashier, $1,000 in exchange or current funds, and charge to the account of real estate loan.

SAWYER & SCOTT.

To Monadnock Savings Bank, East Jeffrey, N. H."

This draft was indorsed as follows: "Pay W. H. Wyanant, Esq., cashier, or order, for account of the Riley County Bank of Manhattan, Kansas, J. K. Winchip, cashier." And the real question in this case is as to the scope and effect of this indorsement.

After copying the draft and indorsement in the petition, and besides the other allegations to show the liability of the defendants, plaintiff alleged that it was the legal owner and holder of the draft and entitled to recover the amount due thereon. On the trial the cashier of the plaintiff bank was asked to state who was the owner, and also what interest, if any, the plaintiff had in the bill. The testimony was objected to as incompetent and irrelevant, and the objection sustained. A demurrer to plaintiff's evidence was thereafter sustained, and from these rulings the plaintiff brings error to this court.

The ruling of the district court was founded upon the idea that this indorsement was a restrictive indorsement, defining the rights and title of the indorsee, and not open to contradiction or explanation by parol testimony. In other words, this indorsement is a written contract, conclusive as against any parol testimony, and which shows absolutely that the plaintiff was not the owner, the real party in interest, but only held the draft as agent and for the purposes of collection. That this was a restrictive indorsement and that it operated to transfer the draft to the plaintiff only as agent for purposes of collection can not be denied. Byles on Bills, 152; 1 Daniel on Negotiable Instruments, sec. 698; Blaine v. Bourne, 11 R. I. 119; 23 American Reports, 429, and cases cited. In this latter case, speaking of an indorsement, almost identical with the one at bar, the court says: "The indorsee is rather an agent of the indorser with power of substitution, and the bill is still in the possession of the indorser by his agent." And again, "the words are notice that the restricted indorsee has no property in the bill."

Again, it will be perceived that this is not a mere blank indorsement, but one in which the contract is written out in full, and therefore, like any other written contract, not to be contradicted or varied by parol evidence, (Greenleaf on Evidence, secs. 277, 281 and 282; Dan. on Negotiable Instruments, sec. 717;) so that upon the face of the paper it appeared affirmatively that the plaintiff was not the owner, but only an agent for collection. But it is insisted by counsel for plaintiff that, as it has already been decided by this court, that one who is in fact the owner and holder of a note negotiable by indorsement, may maintain an action upon it, although it has never been indorsed to him. Williams v. Norton, 3 Kas. 295; McCrum v. Corby, 11 Kas. 465; Weeks v. Medler, 20 Kan. 65. This plaintiff having possession of the note ought to have been permitted to show what interest it had in it, that although the paper was in the first instance transferred to it by this restricted indorsement, it might thereafter have acquired some interest in or title to it, and that therefore it should have been permitted to prove such interest or title. The objection to this is that the petition does not warrant such testimony. It is true that there is a general allegation of ownership, and if this were all, it might be broad enough to permit any evidence of ownership, no matter how acquired. But such a general allegation in a pleading is always limited by the specific statement of the manner by which the title is acquired. Thus if in a real estate action a plaintiff alleges that he is the owner, and then sets ou a chain of title, it will be understood that he predicates his ownership upon the title which he discloses, and the testimony will be restricted to such title. So here, the pleader sets out the draft and alleges the transfer to the plaintiff by such indorsement, and notwithstanding the general allegation of ownership, it must be understood that such allegation is limited to the specific title disclosed.

Hence we conclude that the district court properly construed the scope and effect of this indorsement and the limitations of the petition, and the judgment will therefore be affirmed.

All the justices concurring.

STATUTE OF FRAUDS — CONTRACT FOR YEAR'S SERVICE.

COLE v. SINGERLY.

Maryland Court of Appeals.

S having entered into negotiations for the purchase of a mill from P found C in charge of said mill, and said: "If I buy this mill from P I will employ you to take charge of it for a year, and will pay you $1,000 a year." C accepted the offer. S bought the mill, and wrote to C two days after, informing him of that fact. C, on the day the letter was received, entered the service of S, and continued therein until April 20, 1880, at which time C was ready and willing to perform the services agreed upon until the end of the year. *Held*, that the above contract does not come within the statute of frauds; that the statute of frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed. A contingency is not within it, nor any case that depends upon a contingency; that the statute will not apply where the contract can by

any possibility be fulfilled or completed in the space of a year, although the parties may have intended its operations sh uld extend through a much longer period.

H. McCullough and H. C. Thackery, for plaintiff; *W. T. Warburton, Jr.*, for defendant.

YELLOTT, J., delivered the opinion of the court:

This is an appeal from the judgment of the circuit court for Cecil county in an action brought by the appellant, the plaintiff below, for an alleged breach of a contract. The declaration contains three counts. The first sets out the special contract, the others being the common counts for "work and labor done" and accounts stated.

It appears from the record that the appellee, a resident of the City of Philadelphia, having entered into negotiations for the purchase of a certain mill situate in Cecil county, Maryland, and owned by a Mr. Patton, found the plaintiff in charge of said mill, and entered into a conversation with him concerning the property. At the trial of the cause in the court below, the plaintiff testified that at that interview, which occurred on the 8th day of March, 1880, the defendant said: "If I buy this mill from Mr. Patton, I will employ you to take charge of it for a year, and will pay you $1,000 a year, and that will be more than $3 a day;" that the plaintiff then accepted said offer; that the defendant further said: "If I buy the mill I will let you know;" that the plaintiff replied, "all right;" that on the 10th of March, 1880, the plaintiff received from the defendant a letter dated at Philadelphia on the 9th of March, signed by said defendant, and admitted by his counsel to be in his handwriting, in which he says: "I bought the mill of Mr. P on Thursday; I will send two of my employees to see you, and I wish you would, together with them, see what is to be done to put the mill in good shape. I propose putting you in charge of the mill, and want to get at work as soon as possible." The remaining portion of the letter gives directions relative to the management of the property and the payment of the operatives to be employed.

The plaintiff further testified that on the day and year the said letter was received, he entered the service of the defendant, and continued therein until he was discharged on the 20th of April, 1880, at which time he was ready and willing to perform the services agreed upon until the end of the year.

The defendant testified that he had visited the mill on the 8th of March, 1880, and found there, but denied that he had hired the plaintiff on that day, or any other day, at a salary of $1,000, or any other sum. He further stated that he had no recollection of having written any letters to the plaintiff, but admitted the handwriting to be his. The first prayer of the plaintiff asserts his right to recover on the special contract, if the jury believe he was employed for the year, commencing on the 10th of March, 1880, and ending on the 10th of March, 1881, at a salary of $1,000 for the year, and was discharged by the defendant or his agent before the end of the year; and further believe that the plaintiff had faithfully performed his part of the contract, and was willing to continue to do so. The plaintiff's second prayer asserts that the measure of damages is the salary for the whole year, after deducting amount of payment on account of said salary. The plaintiff's third prayer asks the court to instruct the jury that there is no evidence in this cause that the dismissal of the plaintiff, if they find he was dismissed by the defendant from his service, was for sufficient cause.

These prayers of the plaintiff were rejected by the court; and in conformity with the legal propositions enunciated in the prayers presented by the defendant and granted by the court, the jury were instructed—1st. That there was no legally sufficient evidence to entitle the plaintiff to recover on the first count in his declaration. 2d. That there was no evidence legally sufficient to entitle him to recover on the third count. 3d. That if the jury should believe from the evidence that the defendant employed the plaintiff, and that the plaintiff entered his service on the 10th day of March, 1880, and continued therein until discharged, he was entitled to recover on *quantum meruit*.

To the rejection of his prayers and the granting of the defendant's prayers the plaintiff excepted, and thus brings the questions involved in controversy into this court for final adjudication.

The two first instructions asked for by the defendant and granted by the court, being in the nature of a demurrer to the evidence, carry with them a concession of the truth of such evidence and an absolute negation of all antagonistic facts adduced in proof by the party applying for such instructions. These instructions would seem to rest solely on the ground that the evidence in the cause disclosed the formation of an unwritten contract on the 8th day of March, 1880, for services which could not be performed within a year and that such contract could not therefore become the foundation for a successful action; the remedy for its infraction being barred by the operation of the fourth section of the Statute of Frauds. The instructions necessarily bring the whole evidence under review, in order that the terms of the contract and the time of its completion may be ascertained. In this inquiry the intention and meaning of the parties are to be sought for. Did they intend to put themselves under the reciprocal obligations of an oral agreement in the conversation on the 8th of March, 1880? or did what was then said merely constitute the preliminary negotiation having relation to some prospective arrangement to be fully perfected at some subsequent period? The language used by the defendant, as disclosed by the record, was, "If I buy this mill I will employ you to take charge of it for a year, and will pay you $1000." He does not say "I am about to buy this mill, and do now employ you to take charge of it." The language indicates that something was to be done

at another and a future period. "I will employ you" seems to imply "I will make a contract with you;" and when it is further said that the plaintiff accepted the offer, the apparent construction is that he used words suggestive of his willingness to enter into the contemplated arrangement and to complete the contract, and became fully bound by its obligations at any time when the defendant was in a situation to accomplish what he intended.

A consideration of the peculiar circumstances at the time when the conversation occurred, leads to this conclusion. The defendant did not then own the mill, and there was a possibility that he might never acquire the property, and these were facts within the knowledge of both parties. Is it to be supposed that the defendant then and there intended to contract with the plaintiff to take charge of property which he might never own? Did he, on that occasion, with a perfect knowledge of all the facts, deliberately impose upon himself the obligations of a contract which he might never be able to perform? It may safely be assumed that a man of ordinary intelligence would never entangle himself in such difficulties. The words, "If I buy this mill I will employ you," would seem to indicate an inchoate arrangement to be fully consummated at some subsequent period, and which being so consummated might not be within the statute. Conceding, however, that there was a perfect contract entered into by the parties to this cause on the 8th day of March, 1880, the remedy is not barred by the Statute of Frauds, and can therefore be enforced. The performance within the time limited by the statute was dependent upon a contingency. The defendant said, "if I buy the mill." This contingency might have happened within an hour after the utterance of these words. In that event, the contract being already operative, the services could have been performed within a year. Judicial construction in England and in this State has placed this question beyond the limits of controversy.

In the case of Fenton v. Embers, 3 Burr. 1281, it is said by Denison, J.: "The statute of frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed. A contingency is not within it, nor any case that depends upon a contingency."

This construction of the statute has received an unqualified recognition in this State. In the case of Ellicott v. Peterson, 4 Md. 488, it is said: "These principles have been recognized by innumerable decisions, both in England and in this country. And in pursuance of the principles which they sustain, especially that of the case of Peter v. Compton, it has been held, both in England and in these States, the statute will not apply where the contract can by any possibility be fulfilled or completed in the space of a year, although the parties may have intended its operations should extend through a much longer period." The learned chief judge who delivered the opinion of the court in that case supported this construction of the statute by the citation of a number of authorities, both English and American.

This is therefore no longer a mooted question in Maryland. When there is a possibility that the services may be performed within a year, the remedy for a breach of the contrate is not barred by the statute. This record contains no evidence which shows that the mill was not purchased on the 8th day of March, 1880; and there is a strong probability that this contingency did occur on that day, as the letter of the defendant informing the plaintiff of the purchase is dated in Philadelphia on the day after. If the parties entered into the contract on the 8th day of March, and the purchase was effected on that day, it was an agreement clearly not within the statute. The absence of proof as to the precise time of the purchase is fatal to the assumption which seems to have formed the basis of the instructions granted by the court below.

From what has been said, it follows that there was error in the rejection of the plaintiff's prayers and in granting the first and second prayers of the defendant. The judgment must therefore be reversed and a new trial awarded.

WEEKLY DIGEST OF RECENT CASES.

1. ATTORNEY AND CLIENT — IMPLICATION OF POWER TO COMPROMISE.
An authority to compromise can not be inferred from the bare relationship of attorney and client. Persons dealing with an attorney-at-law respecting his client's business may justly infer that he has all the powers implied by the relation, but not that he has the powers of a general agent to compromise and release debts or transfer and convey the goods or lands of his client. *Isaacs v. Zugsmith*, S. C. Pa., April 16, 1883; 40 Leg. Int. 335.

2 CONVEYANCE—SALE OF LAND—STANDING TIMBER—REAL AND PERSONAL PROPERTY.
By written contract P agreed to sell a piece of land to H, and convey when the purchase-money was paid. The standing timber was to remain P's as security. H, without paying, cut and sold a part of the timber to J, and P gave notice of his ownership; thereupon J bought P's interest in the land and timber, prior to any attachment. Before J's deed was recorded the lumber, not having been delivered, was attached by the creditors of H. *Held*, that J was the owner of the land, and by legal sequence the lumber; and that he could follow it and assert his dominion over it. *Dickerman v. Ray*, S. C. Vt., January Term, 1883; Reporter's Advance Sheets.

3. CRIMINAL LAW—LARCENY—CONVERSION.
Where property is hired with a *bona fide* intention

of returning it, according to the contract, a subsequent conversion of the property does not amount to larceny. *Hill v. State*, S. C. Wis., April, 1883; 15 Ch. Leg. N. 381.

4. EVIDENCE—ALTERED INSTRUMENT — PRESUMPTION.

Suit was brought on the official bond of a guardian. The name of A written in the body of the bond and subscribed as one of the sureties was in both places erased. *Held*, that as the bond was on the files of the court, the presumption is that it was the bond approved by the court, and that the alterations were made by the obligors before delivery or presentation for approval. *Zander v. Commonwealth*; S. C. Pa., April 2, 1883; 40 Leg. Int. 296; 14 Pittsb. L. J. 21.

5. INSURANCE, FIRE—PROOF OF LOSS— WAIVER—STATEMENT OF OWNERSHIP.

As a rule the law does not require vain things, and where technical proofs could but re-state information of a total loss, of which an insurance company was already fully advised, to insist upon such technical proofs would be to oppose the barest technicality as a bar to the assured's right to recover a strictly honest claim. The waiver of proofs of loss, required in a policy, may be inferred by any act of the insurer evincing a recognition of liability or a denial of obligation exclusively for other reasons. If the equitable title to a property is in the assured it is equivalent to a fee in making good the statement of "ownership" in the application for the insurance. *Pennsylvania Fire Ins. Co. v. Dougherty*, S. C. Pa., April 16, 1883; 40 Leg. Int. 334.

6. JUDGMENT—COLLUSION—COLLATERAL INQUIRY.

A collusive judgment may be inquired into collaterally. Judgments entered or maintained by collusion or fraud of both parties are to be distinguished, however, from judgments obtained by the fraud of the plaintiff; the former are void as to creditors only, and can be attacked in any collateral proceeding by them, whilst the latter can be attacked by the defendant alone, directly and in the proper court. A judgment confessed voluntarily by an insolvent or indebted man for more than is due, is *prima facie* fraudulent within the statute of 13 Eliz., c. 6; but then it is only *prima facie* fraudulent, and the presumption may be rebutted. *Meckley's Appeal*, S. C. Pa., May 7, 1883; 40 Leg. Int., 336.

7. LIQUOR LAWS — CONSTITUTIONALITY — JURY TRIAL.

Intoxicating liquor, seized and condemned according to law, is outlawed, is without rights, and a claimant of such liquor is not entitled to a trial by jury. *State v. Intoxicating Liquor*, S. C. Vt., January Term, 1883; Reporter's Advance Sheets.

8 MARRIAGE— EVIDENCE— VALIDITY— INCONSISTENT DECLARATIONS.

H B, just previous to his marriage to the complainant, remarked: "I will marry you, but understand I will never live with you." The marriage was kept secret, and H B and complainant cohabited together and bare children. *Held*, that this marriage was legal. That the defendant had reasonable ground to question the fact of marriage, and that the costs be equally divided between the parties. *Brooke v. Brooke*, Md. Ct. App., April Term, 1883; 10 Md. L. Rec., No. 22.

9. MASTER AND SERVANT — NEGLIGENCE OF FELLOW-SERVANT.

1. A railroad company is liable in an action on behalf of its fireman killed by the washing out of a culvert, the culvert being in an improper condition resulting from negligence and carelessness of its bridge-builder and road-master. 2. The negligence of the bridge-builder and road-master in caring for the culvert in law was the negligence of the defendant; and notice to the former of a defective construction was notice to the latter; hence, it is not a question of whether the servant whose negligence caused the injury and the servant injured were fellow-servants; nor, whether the former was ordinarily skillful; nor, whether the defendant was negligent in employing them. *Davis v. Central Vt. R. Co.*, S. C. Vt., October Term, 1882; Reporter's Advance Sheets.

10. NEGLIGENCE—RAILWAY FIRES—INSURANCE AS A DEFENSE.

Where suit was brought against a railroad for damages done to cotton by fire from a locomotive, and the defense set up was that the cotton was fully insured and the policies had been collected: *Held*, a demurrer to such defense was properly sustained. *Texas, etc. R. Co. v. Levi*, S. C. Tex., June 29, 1883; 2 Tex. L. Rev., 50.

11. NUISANCE—LAYING OF WATER PIPE—EMPLOYMENT OF CONTRACTOR.

It is not a nuisance *per se* for a private citizen acting under municipal license to dig a trench in a public highway for the purpose of laying a water pipe, and it is not such an act as renders parties engaged in it guilty of a public wrong. The entire execution of laying the pipe being committed as an independent employment to a contractor, the employer is not responsible for the mode of such execution. *Smith v. Simmons*, S. C. Pa., April 16, 1883; 40 Leg. Int. 334.

12. SURETY — REPLEVIN BOND — CONFESSION OF JUDGMENT BY PRINCIPAL.

A party in becoming surety for defendant in an action of replevin, must be considered as having contracted with reference to the law applicable to the trial and final determination of the case, and with a view of becoming responsible for the amount that might ultimately be adjudged against such defendant. The confession of judgment by defendant is a regular and orderly mode of ending a pending suit. Such confession by defendant would not release his sureties in the absence of collusion. *Bradford v. Frederick*, S. C. Pa., Dec. 30, 1882; 14 Pittsb. L. J. 21.

13. UTTRA VIRES—LIABILITY OF CORPORATION FOR MONEY HAD AND RECEIVED CONTRARY TO ITS BY-LAWS.

A corporation sued for money had and received will not be heard to answer that the following by-law was in force at the time of the transaction; "No debt shall be contracted for or in the name of the company, except by the order of the board of directors, and then not in excess of the funds actually in the treasury," and that the board of directors did not authorize the creation of the liability, and there were at the time no funds in the treasury. It is not material whether or not, by the law of the home of the corporation, such by-law has the force of a statute. A corporation that has receive money or property from another and appropriated it, cannot be heard to refuse to account for it, on the ground that it had no power under the charter to take it. *Manville v. Belden Mining Co.*, U. S. C. C., D. Colorado, June 23, 1883; 3 Col. L. Rep. 558.

14. WILL—RULES FOR CONSTRUCTION.

In the construction of a will the following are three

cardinal canons to ascertain and give effect to the intent of the testator. First, regard must be had to the whole scheme of the will, and if it is found that a particular intent is inconsistent with the general intent, the former must give way to the latter; second, the order in which words are placed is not to be considered exactly, if a different arrangement will better answer the apparent intent of the testator; third, no presumption of an intent on the part of the testator to die intestate of any part of his property is to be made when his words, as found in the will, can be construed to dispose of the whole of it. *Ferry's Appeal*, S. C. Pa., Feb. 26, 1883; 40 Leg. Int. 295.

QUERIES AND ANSWERS.

*[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The querie must be brief; long statements of facts of particular case must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

66 A owns certain land, being all the property he has liable to execution. B recovers judgment against A, which judgment is filed and becomes a lien upon the land on July 1. C recovers judgment, which is filed Aug. 1. B obtains another judgment, which is filed Sept. 1. B issues execution under his last judgment, and the sheriff sells the land to B for the amount of his last judgment with costs, etc. Shortly after the land is again sold under an execution issued upon B's first judgment, and is again bid in by B. Query: Did the purchase by B under his last judgment (which was, of course, subject to C's lien), extinguish or merge the lien of B's first judgment? Did the second sale have the effect to extinguish C's lien? What did B acquire by his second purchase? In short, does C's lien still hold good, or is it wiped out? ONEIDA.

Appleton, Wis.

QUERIES ANSWERED.

Query 59. [17 Cent. L. J. 139.] A sells to B a tract of land for $500. C has a mortgage on said land to secure a debt of $500, of which B has full notice when he buys. B does not go into possession, and C forecloses as against A, not making B a party. The land is sold and brings only $400. Can C maintain an action against B for the $100 deficiency? Please cite authorities.

Corsicana, Tex. D. E. G.

Answer No. 1. *a*. No mortgagee can maintain an action against the vendee of a mortgagor for a mortgage debt on the property existing at the time of the purchase, unless such debt is assumed by such vendee. *b*. B should have been joined in the proceeeings of foreclosure, but the only effect of his non-joinder is that he yet has a right to redeem. As to the first, see Johnson v. Morrell, 13 Iowa, 300. and Bumgardner v. Allen, 6 Munf. (Va.) 439. For the second, see Frische v. Kramer, 16 Ohio, 125. I apprehend the fact that B was not in possession, is immaterial.

Kansas City, Mo. T. W. NELSON.

Answer No. 2. C can not maintain an action against B for the $100 deficiency, nor was B at any time liable personally for any part of the mortgage debt. Lee v. Newman, 55 Miss. 365; Second Nat. Bank v. Grand Lodge F. & M. Masons, 8 Cent. L. J. 71-72 and note.

Vicksburg, Miss. J. D. GILLAND.

Answer No. 3. According to the statement B did not assume the payment of the debt due C, but purchased the land with notice of the incumbrance. The land was subject to sale under proper proceedings for foreclosure of lien created by mortgage. If the proceeds of sale be insufficient to pay the debt, the debtor is still liable for the deficiency. R. S. Art. 1340. But if the conveyance from A to B contain a recital and stipulation that the same is subject to the mortgage debt and to be paid by B, then it presents a proposition discussed in 16 Cent. L. J. 79. See also Jones v. Higgins, 16 Cent. L. J. 567 and Elliott v. Sackett, 16 Cent. L. J. 288. S.

Houston, Texas.

Answer No. 4. C cannot maintain an action against B. See Hartman v. Olveru, 54 Cal. 61. The purchaser of mortgaged premises does not become the debtor of the mortgagee, even when he agrees to pay the mortgage, unless the mortgagee assents.

San Antonio, Texas. S. W. ELLIS.

RECENT LEGAL LITERATURE.

SCHOULER'S EXECUTORS AND ADMINISTRATORS. —A Treatise on the Law of Executors and Administrators. By James Schouler, Boston, 1883: Soule & Bugbee.

This volume completes Mr. Schouler's Series on the Law of Personal Property. The three preceding volumes are Vol. I, of Schouler on Personal Property, treating of the Nature and General Incidents of Personal Property, Vol. II, of the same, treating of Gifts and Sales of Personal Property; and Schouler on Bailments. The acknowledged excellence of Mr. Schouler's preceding works on "Domestic Relations" and "Husband and Wife" is a guaranty of the useful qualities of the present work, while the immense volume of the probate business of the country in an indication of the extremely wide field of usefulness that lies before the book. The work is very handsomely printed and bound.

STEPHEN'S DIGEST OF CRIMINAL PROCEDURE. A Digest of the Law of Criminal Procedure in Indictable Offenses. By Sir James Fitz James Stephen, a Judge of the High Court of Justice, Queen's Bench Division, and Herbert Stephen, Esq., of the Inner Temple. Barrister at Law. London, 1883: Macmillan & Co.

This work is not a digest in the American sense of being a collection of references to adjudicated law, but is an attempt at a precise and logical statement of the law, both statutory and bench-made, in the simplest possible language; it is more properly a *code* in the sense that the *Code Napoleon* is, except the lack of statutory force. While of unquestionable utility to the English practitioner, we doubt that the American lawyer will find it available, because of the immense mass of statutes peculiarly English, which have been embodied in it.

AMERICAN DECISIONS INDEX. Index to the American Decisions and the Editor's Notes Thereto, with a Table of Cases Reported. Vols. 31 to 45 inclusive—1837-1846. By A. C. Freeman. San Francisco, 1883: A. L. Bancroft & Co.

This is an excellent index of the fifteen volumes of the series indicated. It seems to have been very carefully compiled, and to be complete in every respect. A most useful feature, frequently wanting in other works of a similiar character, is the table of cases, reported in the volumes indexed. This index, together with the digest to volumes 1 to 30, heretofore noticed (15 Cent. L. J. 220), form a complete guide to the series as far as completed, and add very materially to its value.

TWENTIETH WEST VIRGINIA. Reports of Cases Argued and Determined in the Supreme Court of Appeals of West Virginia, at the June, August and Fall Special Terms, 1882. By Cornelius C. Watts. Attorney General and Ex-Officio Reporter. Vol. 20. Wheeling, 1883: C. H. Taney, State Printer.

This volume is characterized by exhibiting in an unusual degree the most glaring faults common in published reports, viz.: inordinately long opinions and excessively diffuse syllabi. The former are strikingly tedious and the latter very frequently occupy a page and not unfrequently two or three pages, which, to a profession burdened with the modern multiplication of precedents and an ever-increasing flood of volumes, will seem simply inexcusable.

LEGAL EXTRACTS.

NOVEL ACTIONS.

The papers report some actions that are rare, if not quite new. The most noteworthy is the colored boy's action for compensation for furnishing blood, by the operation of transfusion, to the defendant when he was asphyxiated. This case is an apt illustration of the way in which every step in the progress of applied science gives rise to new questions. It is said that the action was for goods sold and delivered, and this may not have been an inappropriate form for the pleader to resort to; but it is curious to observe that the novelty of the relation of the parties involves different legal elements. The defendant was asphyxiated and could neither order goods nor request services, nor call a physician who might act as his agent in so doing. Nor did he have any opportunity, on recovering consciousness, to reject the service or return the goods. But these circumstances and others, although they might be regarded as taking the case out of the category of "goods sold," do not necessarily affect the meritorious character of the claim nor deprive it of a legal foundation.

The case is more like those of services rendered in an emergency, where even voluntary assistance, if followed by a recognition of its value and a promise of reward, has been held to give a legal right.

The Jerseyman who sued a rude boy for assault and battery of his horse is to be regarded as a sort of private society all by himself for the prevention of cruelty to animals. The main question will be whether he can prove any damages. If the condition of the horse bears no traces of the kick, the question will be whether the pain suffered at the time, or the injury to the feelings of the noble animal, or, in the language of the law, his mental sufferings, or both, will sustain the action. Or perhaps, if the owner himself was present, the indignity put upon him by the onslaught on his steed will entitle him to a recovery. On the whole, we are inclined to think that the interests involved in this action are such that every lover of the equine race must be glad that the legal questions are to be discussed and determined by New Jersey justice.—*Daily Register.*

NOTES

——A fugitive from justice boasted that he was so well liked by all who knew him that he never left any place without a reward being offered for his return.

——"Prisoner, how old are you?" "Twenty-two, your Honor." "Twenty-two? Your papers make out you were born twenty-three years ago." "So I was, but I spent one year in prison, and I don't count that—it was lost time."

——One finds not infrequently on the title pages of Chinese newly-published books a caution against their unauthorized publication, in some instances threatening the forfeiture or destruction of all blocks that may be cut for their printing, showing at once that literary property is liable to be stolen, and that redress is afforded to authors thus wronged. The penal code, however, will be searched in vain for an enactment on the subject of copyright. Chinese law has never conceived it necessary to specify that particular form of robbery which consists in despoiling a scholar of the fruit of his toil, any more than to name the products of husbandmen and artisans as under the protection of law, all alike being regarded as property by natural right. The offending publisher is arraigned and punished under that section of the code which takes cognizance of larcenies of a grave character, the penalty, to which one who prints and sells an author's work without authority is liable, being one hundred blows and three years' deportation. This right of exclusive publication by an author of his works is held in perpetuity by his heirs and assigns.—*Dr. D. J. Macgowan.*